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IN THE

Supreme Court of the United States

OTOBER TERM, 1952

No. 311

AGRA B. WILLIAMS,
Petitioner,

v.

PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF RESPONDENT PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the District of Columbia appears on pages 62-66 of the Record. The findings of fact and the conclusions of law are at pages 66-69 of the Record. The opinion of the Court of Appeals (R. 81) has not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered June 12, 1952 (R. 87). The petition for writ of certiorari was filed August 29, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTES INVOLVED.

The pertinent statutes of Virginia are set forth in the Appendix, *infra*, pp. 14-18.

QUESTION PRESENTED.

Whether, under the law of the Commonwealth of Virginia, an incorporated theological seminary has the power to take a bequest.

STATEMENT.

Mary E. Maxwell, domiciled in the District of Columbia, died on March 1, 1949 (R. 66). Under the residuary clause of her will, Item XXVII, the testatrix gave, devised, and bequeathed one-half of her residuary estate, consisting of personal property, to "the Episcopal Theological Seminary of Alexandria, Virginia", which is admitted to be the respondent herein (R. 66-68). The other one-half of the residuary estate was bequeathed to The Virginia Military Institute and is not involved in the instant case (R. 67).* The respondent, Protestant Episcopal Theological Seminary in Virginia, is a non-stock and non-profit corporation of the Commonwealth of Virginia (R. 62), which was initially incorporated by the General Assembly of Virginia by an act passed February 28, 1854 (R. 27).

The testatrix directed that the Seminary's share of the

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* In *Williams* v. *The Virginia Military Institute, et al.*, No. 11175 in the United States Court of Appeals for the District of Columbia Circuit, decided July 31, 1952, the dismissal of petitioner's action against The Virginia Military Institute was affirmed.

residuary estate should be kept intact and invested by it perpetually, and that one-half of the net income arising therefrom should be used for scholarships and the remaining one-half be applied against the current expenses of the institution (R. 67).

The will was admitted to probate, and the American Security and Trust Company, a defendant in the District Court, duly qualified as executor (R. 66).

Petitioner, the next of kin and sole heir at law of the testatrix, filed her amended complaint in the United States District Court for the District of Columbia on April 17, 1950 (R. 2-8). She attacked the corporate powers of the two residuary legatees to take under a will and sought a declaratory judgment that she was entitled to the re-luum of the estate of the testatrix (R. 8). The respond- answered (R. 9-11), and the petitioner moved for summary judgment (R. 13). The respondent filed a cross motion for summary judgment (R. 14) and thereafter submitted supporting affidavits (R. 16-26).

In a memorandum opinion (R. 62-66), filed January 10, 1951, the District Court concluded that under the law of Virginia devises and bequests to incorporated theological seminaries are valid, and that the respondent is a corporation duly organized under the laws of the Commonwealth of Virginia. The petitioner's motion for summary judgment, therefore, was denied and the respondent's motion for summary judgment was granted. An order was entered which decreed that respondent was entitled to take the bequest made to it by the testatrix and dismissed petitioner's action against the respondent Seminary (R. 69-70).

From this judgment the petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. In a unanimous opinion, (R. 81-86), handed down June 12, 1952, that Court affirmed the District Court

and held that under Virginia law the respondent had the capacity to take the bequest. It succinctly analyzed the pertinent Virginia statutes and concluded that they clearly permitted a corporate theological seminary to receive by devise or bequest an educational or charitable donation.

ARGUMENT.

The sole issue presented by this case, whether under Virginia law an incorporated theological seminary has the capacity to receive a bequest, has been passed upon by the District Court and the Court of Appeals. Both courts analyzed the applicable statutes and decisions of Virginia and very rightly concluded that nothing in the law of this Commonwealth precludes the respondent from taking by will. Strictly speaking the exact point in controversy has not been determined by the Supreme Court of Appeals of Virginia, the court of last resort of this State, but its decisions bear so closely upon the precise question here that they leave no doubt of the correctness of the decisions in the two courts below. The petitioner cannot produce a Virginia case which holds that a testamentary gift to an incorporated seminary or similar body corporate is invalid. Nor can the petitioner even cite a Virginia decision that a charitable bequest, religious or otherwise, to a corporation for purposes within the scope of its incorporation is invalid. This case has been correctly settled below; there is no conflict between the Court of Appeals for the District of Columbia and the Supreme Court of Appeals of Virginia; and there is no reason for a review by this Court.

1. As recognized by an unbroken line of Virginia decisions the respondent Seminary can take and hold a testamentary gift by virtue of its charter granted by the General Assembly of Virginia and by virtue of the law of

Virginia, both statutory and decisional. Under its charter of 1854 the respondent (herein sometimes called the Seminary) is empowered by the Virginia Legislature "to hold, receive and purchase" lands, tenements, money and other chattels and to manage and dispose of the same (R. 27). In addition Va. Code, § 13-19 confers upon corporations generally the power to hold real and personal estate for corporate purposes and states that the "power to hold real and personal estate shall include the power to take the same by gift, devise, or bequest" (Appendix p. 14). And Va. Code, § 13-224 endows non-stock corporations specifically with the power "to take and to hold by gift, purchase, grant, devise or bequest, any property —real, personal, or mixed—and to dispose of the same at pleasure" (Appendix, p. 15).

2. A charitable bequest or devise to a corporation for purposes within its corporate powers has always been upheld in Virginia. *Gallego's Ex'ors.* v. *The Attorney General,* 3 Leigh (30 Va.) 450 (1832); *Roy's Ex'ors.* v. *Rowzie,* 25 Gatt. (66 Va.) 599 (1874); *Protestant Episcopal Education Society* v. *Churchman's Reps.,* 80 Va. 718 (1885); *Trustees* v. *Guthrie,* 86 Va. 125, 10 S. E. 318 (1889); *Fifield* v. *Van Wyck,* 94 Va. 557, 27 S. E. 446 (1897); *Jordan* v. *Richmond Home,* 106 Va. 710, 56 S. E. 730 (1907); *Jordan* v. *Universalist General Convention Trustees,* 107 Va. 79, 57 S. E. 652 (1907); *Fitzgerald* v. *Doggett's Ex'or.,* 155 Va. 112, 155 S. E. 129 (1930); *Moore* v. *Perkins,* 169 Va. 175, 192 S. E. 806 (1937).

In *Fitzgerald* v. *Doggett's Ex'or.,* 155 Va. 112, 124, 155 S. E. 129 (1930), the Supreme Court of Appeals of Virginia took the occasion to review the prior Virginia cases on the subject of charitable trusts and thus summarized its conclusion:

> "These decisions establish that the law in Virginia, independent of the statute, is that an indefinite charity, educational, religious, or otherwise, made to an individual or to an unincorporated body, is invalid upon the ground of indefiniteness and uncertainty, but an indefinite charitable bequest or devise to an incorporated body having the same corporate powers or functions as the general object of the testator's bounty is valid."

Roy's Ex'ors. v. *Rowzie,* 25 Gratt. (66 Va.) 599 (1874) upheld the validity of a bequest by a Virginia resident to a theological seminary incorporated and situated in South Carolina. The same contentions were advanced as the petitioner is now making and our Court of Appeals met them with these words:

> "There is certainly nothing in the constitution which inhibits a bequest to a theological seminary; and we have seen that there is nothing in the statute law which inhibits a bequest to such a seminary if it be incorporated. Nor is there anything in the policy of our law, as has been argued, which can make such a bequest unlawful." 25 Gratt. (66 Va.) at 611.

Thereafter in its opinion the court alluded to the respondent in the instant case by name and made the following statement:

> "The law has left unaffected the right to make a bequest for a certain and definite object, though it be a theological seminary; and if such a right be not in pursuance of the policy of the law, it is certainly not contrary to it. The sense of the legislature on this subject, as was well said in argument by the counsel for the appellants, appears from the act passed February 28, 1854, entitled 'an act incorporating the Protestant Episcopal Theological Seminary and High School in Virginia.' Acts of Assembly, 1853-'4, p. 65,

chap. 107. Suppose the bequest in this case had been made to that corporation, instead of the corporation of 'the Southern Baptist Theological Seminary,' would anybody have doubted its validity? or, suppose the Southern Baptist Theological Seminary had been incorporated by the State of Virginia instead of South Carolina, and the bequest in this case had been made to it, would anybody have doubted its validity? These questions must be answered in the negative." 25 Gratt. (66 Va.) at 611-612.

In *Gallego's Ex'ors.* v. *The Attorney General,* 3 Leigh (30 Va.) 450 (1832), Virginia followed the lead of Chief Justice Marshall in *Baptist Association* v. *Hart's Ex'ors.,* 4 Wheat. 1 (1819), and held that independently of statute charitable bequests and devises to unincorporated associations could not be sustained by courts of equity. Our Court of Appeals has adhered to this rule in spite of Mr. Justice Story's opinion in *Vidal* v. *Girard's Ex'ors.,* 2 How. 127, 11 L. Ed. 205 (1844), which on the basis of "more satisfactory sources of information" held erroneous the conclusion of *Baptist Association* v. *Hart's Ex'ors.* See *Moore* v. *Perkins,* 169 Va. 175, 192 S. E. 806 (1937). The *Gallego* case, however, made clear that "a bequest to a corporation capable to take, is and always was valid as a charitable gift." 3 Leigh (30 Va.) at 468.

To remedy the effect of *Gallego's Ex'ors.* v. *The Attorney General,* 3 Leigh (30 Va.) 450 (1832), the General Assembly of Virginia on April 2, 1839, passed an act entitled "An ACT concerning devises made to schools, academies and colleges." The petitioner relies heavily upon this statute, and for that reason it is set out in full in our appendix at pages 16-18. This act with its subsequent amendments and codifiers' changes did not have the effect of validating devises or bequests to charitable corporations. Such testamentary gifts had been valid in Virginia prior to this

statute and continue to be valid today. The act, as is apparent from a reading of its first section, was to validate devises and bequests for the establishment of unincorporated schools and charitable trusts for the education of free white persons. It did not have reference to incorporated schools of any kind.

The legislature, moreover, excepted from the operation of this enabling statute unincorporated theological seminaries. Only incorporated seminaries, the charters of which expressly limited their holdings, could receive devises and bequests; thus the legislature kept control over the amount of property which could be accumulated in the hands of these institutions.

Through successive amendments and revisions this enabling statute evolved as Section 55-26 of the Virginia Code of 1950 and has remained unchanged since the death of the testatrix. It now reads as follows:

> "§ 55-26. **Validity.**—Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons within this State and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons within this State, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled 'an act concerning devises made to schools, academies, and colleges.'

> Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary. (Code 1919, § 587.)"

The changes in phraseology through the various revisions and codifications clearly show that this statute at no time invalidated bequests or devises to an incorporated theological seminary. See Acts of Assembly 1840-41, Chap. 26, p. 52; Sec. 2, Chap. 80 of the Virginia Code of 1849; Sec. 2, Chap. 80 of the Virginia Code of 1860; Sec. 2, Chap. 77 of the Virginia Code of 1873; Sec. 1420 of the Virginia Code of 1887; Section 587 of the Virginia Code of 1919; Section 55-26 of the Virginia Code of 1950.

In *Roy's Ex'ors.* v. *Rowzie,* 25 Gratt. (66 Va.) 599, 610 (1874) the Supreme Court of Appeals of Virginia traced the legislative development of this statute and said of the exclusion of unincorporated seminaries from its effect:

> "But certainly that exception to an exception cannot have the effect and could never have been intended to make invalid a definite bequest to an incorporated theological seminary, expressly authorized by its charter to take and hold property given to it by bequest or otherwise. Such a bequest had always been valid in this state if not everywhere else. The purpose of the acts of 1839 and 1841 was to make valid a certain class of donations which had never been valid before, but to make an exception in that case only of a theological seminary. They were enabling acts, which were not to extend to a theological seminary; but certainly they were not intended, and cannot have the effect to disable an incorporated theological seminary to take and hold property according to its charter, which it had always before a perfect right to do."

The legislature of Virginia has definitely accepted this interpretation when it ends the present statute by saying:

> "Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary."

Petitioner, however, contends that devises and bequests to an incorporated theological seminary are invalidated by the previous clause of the statute:

> "except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the Act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled 'an act concerning devises made to schools, academies, and colleges'."

This language, as both the District Court and the Court of Appeals recognized, is in the past tense, "have failed or become void." It does not refer to such devises or bequests as shall fail or become void in the future. By the seventh section of the Act of April 2, 1839, it was provided that in certain cases a devise or bequest was to fail if the legislature refused to incorporate within a certain time the object of the testator's charity. This requirement was eliminated by the Virginia Code of 1849, but those devises and bequests which had been invalidated because of the failure of the legislature to act were to remain void. See *Kelly* v. *Love's Adm'r.*, 20 Gratt. (61 Va.) 124, 132-13 (1870).

In short, an incorporated theological seminary in Virginia could take by devise or bequest at common law, could take after the passage of the Act of April 2, 1839, and can take today.

3. The Seminary is still operating under its original charter of 1854. Under that charter it was empowered by the legislature to hold and receive lands, money and other

chattel and to dispose of and manage the same as might seem best; to appoint professors, tutors and other proper officers; to make and establish by-laws, rules, and regulations consonant with the laws of Virginia and the United States (R. 27-29). Later amendments conferred upon the corporation the power to grant degrees and raised the total amount of real estate which it might receive and hold to five hundred acres and the personal property to three million dollars (R. 29-59).

The purposes of the corporation are apparent from a reading of the entire charter. As revealed in its name its purpose is to operate an Episcopal theological seminary, and for that purpose its charter granted it the powers incident thereto. A "seminary" has been defined as a place of education, as a school, academy, college or university where persons, especially the young, are instructed in the several branches of learning to prepare them for their future profession. Specifically a seminary is a school for the education of men for the priesthood or ministry, and this nature of the word is made crystal clear where the word "theological" precedes the word "seminary". The origin of "seminary" seems to imply a place where the seeds of education are sown and implanted. 39 Words and Phrases 585, 586, 41 Words and Phrases 525; see also Vol. IX of The Oxford English Dictionary at pp. 442-443.

Petitioner apparently is advancing the contention that upon obtaining an amendment to its charter after the year 1902 a Virginia corporation must obtain an entirely new certificate of incorporation which contains all the provisions required for corporations initially chartered after the year 1902; hence failure to do so will abrogate its charter. There is absolutely no basis for this contention.

When the respondent was chartered in 1854 all charters of incorporation were granted by the Legislature of Virginia. In 1902 the State Corporation Commission was established, and subsequent to that date all charters and amendments to outstanding charters have been issued by the Commission. When, however, an amendment to an existing charter is sought there is no requirement that a corporation must obtain an entirely new certificate of incorporation which contains the provisions required for corporations created originally after 1902. Under the Virginia Code and the actual practice of the State Corporation Commission a charter may be amended section by section. When amended the particular section must be in the form required by the present law, but the entire charter need not be. Va. Code, §§ 13-37, 13-228.

On p. 23 of her petition the petitioner makes a very misleading and unfounded allegation by describing the 1923 amendment to the respondent's charter as "a complete new charter". The amendment of 1923 was not a new charter. It was an amendment and nothing more. The principal effect of the amendment was to change the name of the corporation from "The Trustees of the Protestant Episcopal Theological Seminary and High School in Virginia" to "The Trustees of the Protestant Episcopal Theological Seminary in Virginia". The purpose of the amendment was to release the Episcopal High School from its unity with the Seminary and to allow it to go on its own individual way. The Seminary continued under its original charter as is best shown by the language of the amendment itself. (R. 42-48).

4. The petitioner has also raised the question as to whether the courts below could consider the affidavits filed by the respondent with its cross motion for summary judg-

ment. The petitioner's position on this point is that wherever the affidavits tended to sustain respondent's case they were useless, but wherever they contained material upon which the petitioner wished to rely they were worthy of consideration by the courts. Actually all the affidavits should have been considered as they were not denied. 3 Barron and Holtzoff, *Federal Practice and Procedure*, § 1234, § 1237. The question, however, is moot as the issues in this case were fully before the District Court and the Court of Appeals whether they took account of all the affidavits, or of none of them or of just those parts which were agreeable to the petitioner.

CONCLUSION.

This case has been thoroughly considered and passed upon by the District Court and the Court of Appeals. Both courts correctly decided the case in conformity with the law of Virginia, which is well settled on the point involved. A further review is totally unwarranted and there is nothing to invoke the supervisory power of this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

VIRGINIA CODE OF 1950:

§ 13-19. General Powers of Corporations.—Every corporation of this State shall have power:

* * *

(4) To contract and be contracted with, to purchase, hold, and grant such real and personal estate as the purposes of the corporation shall require, and all other real estate which shall have been bona fide conveyed or mortgaged to the corporation, or for its benefit, by way of security, or in satisfatcion of debts, or purchased at sales upon judgment or decree obtained for such debts; and to mortgage or pledge, or convey by way of deed of trust, or otherwise encumber any such real or personal estate as is mentioned in this paragraph, together with the franchise of such corporation, in whole or in part. The power to hold real and personal estate shall include the power to take the same by gift, devise, or bequest.

* * *

(12) To exercise all other powers granted to corporations generally by the laws of this State. (Code 1919, § 3777; 1922, p. 783; 1928, p. 1004; 1938, p. 488; 1946, p. 111.)

§ 13-224. When Corporate Existence Commences; Powers of Corporation.—As soon as the charter has been so issued and admitted to record by the Commission in its office, the persons who signed and acknowledged the certificate and such other persons as may be associated with them according to the provisions of law, or of their charter, and their successors, shall be a body politic and

corporate by the name set forth in the certificate; and as such shall have power:

* * *

(7) To take and to hold by gift, purchase, grant, devise or bequest, any property—real, personal, or mixed —and to dispose of the same at pleasure.

* * *

In addition, such corporation shall exercise any corporate powers necessary to the exercise of the powers above enumerated and given, and shall have all the general powers and be subject to all the general restrictions and liabilities conferred and imposed by this chapter, and by the general laws of this State applicable thereto. (Code 1919, § 3874; 1944, p. 9.)

§ 55-26. Validity.—Every gift, grant, devise or bequest which, since April second, eighteen hundred and thirty-nine, has been or at any time hereafter shall be made for literary purposes or for the education of white persons within this State and every gift, grant, devise or bequest which, since April tenth, eighteen hundred and sixty-five, has been or at any time hereafter shall be made for literary purposes or for the education of colored persons within this State, and every gift, grant, devise or bequest made hereafter for charitable purposes, whether made in any case to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except such devises or bequests, if any, as have failed or become void by virtue of the seventh section of the act of the General Assembly passed on April second, eighteen hundred and thirty-nine, entitled "an act concerning devises made to schools, academies, and colleges." Nothing in this section shall be so construed as to give validity to any devise or bequest to or for the use of any unincorporated theological seminary. (Code 1919, § 587.)

Acts of the General Assembly of Virginia of 1839.

Chap. 12.—An ACT concerning devises made to schools, academies and colleges. (Passed April 2, 1839.)

1. *Be it enacted by the general assembly,* That all devises or bequests of lands, tenements, hereditaments, goods and chattels, stocks and choses in action, hereafter given or made, for the establishment or endowment of any unincorporated school, academy or college within this commonwealth, for the education of free white persons, shall be good and valid in law and equity except as is hereinafter provided.

2. *And be it further enacted,* That if in the will containing such devises or bequests, the testator shall appoint a trustee or trustees to execute such devises or bequests, such trustee or trustees, or those of them who may act, shall have the same right and power to maintain any suit at law, or in equity, that he or they would have had if the beneficiaries had been a certain natural person.

3. *And be it further enacted,* That if the trustee or trustees appointed by the will shall decline to act, or if no trustees shall be appointed in the will, the circuit superior court of law and chancery, having jurisdiction, shall have full power to appoint a trustee or trustees to carry such devise or bequest into execution; and such trustee or trustees shall have the same rights and powers as if he or they had been appointed by the will.

4. *And be it further enacted,* That if any will containing devises or bequests for the establishment or endowment of any school, academy or college, shall be admitted to probate in any of the courts of this commonwealth, other than the circuit superior court of law and chancery, it shall be the duty of the clerk of such court to certify the fact of such probate, and send an attested copy of the will to the circuit superior court of

law and chancery having jurisdiction over the place of granting the certificate of probate as aforesaid.

5. *And be it further enacted,* That at the term at which the copy of such will and certificate of probate aforesaid may be received, or at which any such will may be admitted to probate in the said circuit superior court of law and chancery, it shall be the duty of the court to appoint commissioners to ascertain the character and value of the estate devised or bequeathed.

6. *And be it further enacted,* That all suits brought by any person or persons to impeach the validity of such devise or bequest shall be brought in the said circuit superior court, and the commonwealth shall be made a party defendant thereto, and it shall be the duty of the attorney for the commonwealth in said court to defend such suit. And in any case in which the said attorney may consider it necessary, he shall have authority, and it is hereby made his duty to institute in the name of the commonwealth any proceedings to obtain the probate of any will containing such devise or bequest, or to appoint trustees to execute the same, or to enforce the faithful execution of the trust imposed on such trustees. The court shall, out of the amount of such devises or bequests, if recovered, allow the said attorney such fee as may be deemed reasonable.

7. *And be it further enacted,* That at the term next ensuing the admission of such will to probate, or next ensuing the reception of the said copy of the will and certificate of the probate aforesaid, the said court shall report the case to the legislature, together with the report of the commissioner or commissioners appointed to ascertain the value of the subjects, or estate devised or bequeathed, with any other matter it may think proper. And if the legislature shall refuse at its next session, or fail within two successive sessions after the reception of the said report from the court aforesaid, to incorporate such school, academy or college, the said devise or be-

quest shall fail and be void. But no act incorporating such school, academy or college, shall take away any right of the heirs or distributees to impeach the validity of such devise or bequest, which they would have had if it had been given or made to any natural person or body incorporated at the time of making the devise or bequest; *Provided*, That nothing in this act contained shall be so construed as to give validity to any devise or bequest to any theological seminary.

8. This act shall be in force from the passing thereof.

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Supreme Court of the United States

October Term, 1952

No. 311

AGRA B. WILLIAMS, *Petitioner,*

v.

PROTESTANT EPISCOPAL THEOLOGICAL SEMINARY, IN VIRGINIA, ET AL., *Respondent.*

Petition for Rehearing from the Order of the Court Denying the Application for Writ of Certiorari.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

In spite of the fact that petitions for rehearing are usually denied, yet, so confident is the writer that the petition for writ of certiorari should have been granted, that petitioner is again at the bar of this Court, praying that the order of the Court of October 27, 1952, may be rescinded and the writ granted.

We filed another petition growing out of this case, which we appealed from the same Court, upon a hearing

before the same judges, which is No. 427, on the October docket. In that case, the Court affirmed the lower Court, because it said that the proceeding by declaratory judgment was addressed to the discretion of the trial court. It took no such action, so far as the case (No. 311) was concerned. In the No. 427 case, the Court, inferentially, directed us to try our case in the courts of Virginia, where neither fund nor persons could be found.

In this case, the same judges decided that it could hear the case upon the decision of the District Court and did so.

There is a complete contradiction upon the same question, growing out of the residuary clause of the same will, before the same court.

We ask this Court to grant the writ for the following reasons:

First: The Court of Appeals refused to pass upon the question of affidavits filed by the Theological Seminary. We asked, as a matter of law, because it was apparent that the Court disregarded our objections to these affidavits. This question was not passed upon. The brief of the Theological Seminary urged that because we did not answer these affidavits, they should be considered. Affidavits may be used for the purpose of discovering whether there is an issue of fact, but not for the purpose of deciding an issue of fact. *Farrall* v. *D. C. Amateur Athletic Union*, 80 U. S. App. D. C. 396, 153 Fed. (2nd) 647. They must be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show that affiant is competent to testify as to such matters. *Fox* v. *Johnson Wimsott*, 31 Fed. Supp. 64. See also *Dewey* v. *Clark*, 86 U. S. App. D.C. 137, 180 Fed. (2nd) 766.

Every one of these affidavits violated the hearsay rule. The Circuit Court of Appeals for the District of Columbia

had passed upon the questions arising out of these affidavits. We called the cases to its attention. Each of them was "window dressing."

Second: The Circuit Court of Appeals said that the bequest was good under sec. 587 of the 1942 Code, which is sec. 55-26 of the 1950 Code.

Notwithstanding the urging of counsel for the Theological Seminary, that this bequest was good at common law, that statement is completely at variance with the finding of Judge Tucker in *Gallego's Exors.* v. *The Attorney General,* 3 Leigh 450 (1832), on page 475. This case was recognized and followed in *Fitzgerald* v. *Doggett's Exors.,* (1930) 155 Va. 112, 155 S. E. 129, 132. On page 132, the Court held that the Act of 1839, so frequently referred to, expressly provided "that the Act should not apply to theological seminaries."

Judge Eggleston, in *Triplett* v. *Trotter* (1937), 169 Va. 440, 193 S. E. 514, recognized that the language of the Act then in force, which is the same Act passed upon by the District of Columbia Court of Appeals, that the exclusion of a theological seminary still existed.

In 1 Harrison on Wills 438, which was written in 1927, the standard authority on wills and administration in Virginia and West Virginia, Judge Harrison held that an educational and literary trust did not include a theological seminary.

The text in Harrison on Wills was quoted and approved in *Moore* v. *Perkins* (1937) 169 Va. 175, 192 S. E. 806, 811.

Never, in the Virginias, has a bequest for a theological seminary in Virginia been held valid.

The Circuit Court of Appeals quoted the present Virginia statute, with relation to gifts and grants for educational and literary purposes and held that it applied to devises to theological seminaries. The Virginia Court

has held directly the opposite. *Fifield* v. *Van Wyck*, 94 Va. 557, 27 S. E. 446, 450; *Moore* v. *Perkins*, (1937) 169 Va. 175, 192 S.E. 806, 811. These cases hold that the statute in question applies to educational and literary trusts and does not apply to religious trusts.

We owe an apology to the Court because we neglected, in our former brief for the petition, to emphasize and to call to the Court's attention the fact that the seventh section of the Act of the General Assembly, passed on April 2, 1839, provided that devises or bequests, if any, as have failed or become void, should be excepted; and the Circuit Court of Appeals did not take into consideration the proviso of that seventh section, which is as follows:

> *"Provided, that nothing in this Act contained shall be so construed as to give validity to any devise or bequest to any theological seminary."*

Afterwards, as we called to the Court's attention in our note upon the petition for the writ, the other exception as to an unincorporated theological seminary was added in the Code of 1887, following *Kain* v. *Gibboney*, 11 Otto 362, 25 Law Ed. 813. So, that proviso, that excepted theological seminaries from taking, is still in the Virginia law. We apologize for not calling this fact more specifically to the Court's attention. The Act, as it stands today, excepts from its provisions both incorporated and unincorporated theological seminaries.

Whatever may have been the various changes made from time to time in this Act, the Code of 1919 provided exactly the language of the Act of 1839. Under that act, theological seminaries were excepted, and under the Act of 1887, unincorporated theological seminaries were excepted. It was unquestionably before the legislative eyes that an opportunity and opening had been made in *Kain* v. *Gibboney* for an unincorporated theological seminary, under the auspices of any church, to be validated.

It must be apparent that under the present statute only devises or bequests that failed were those to a theological seminary. The Virginia Court recognizes this fact.

Campbell, C. J., in *Moore* v. *Downham*, 166 Va. 77, 184 S. E. 199, says that "The language of the statute is plain, clear and unambiguous."

In *Protestant Episcopal Education Society* v. *Churchman*, 80 Va. 718, Judge Richardson said:

> "The said seventh section is broad and comprehensive in its terms. It makes valid every transfer of property, real and personal (other than for the use of a theological seminary)", etc.

Even in *Rowe* v. *Rowzie* (1874) 25 Gratt. 599, so heavily relied upon by the Seminary, Judge Moncure, speaking of the 1939 Act (p. 610), said:

> "We think its only purpose was and only effect is to make valid a certain class of indefinite charities, to-wit: charities for literary purposes, but to except from that class thus made valid an indefinite charity to a theological seminary," etc.

In *Moore* v. *Perkins* (1937), 169 Va. 175, 192 S.E. 806, 811, referring to this statute, and quoting from *Kelly* v. *Love's Admr.*, 20 Gratt. 124, says:

> "I think the object of the Legislature, in passing the act, was to change the rule of law laid down in the cases before cited • • • controlling bequests and devises for the establishment of schools and colleges, leaving it in full effect and operation, so far as it applied to bequests and devises for religious purposes. • • • Notwithstanding the fact in the two cases, members of the court had criticized the opinion in the Gallego case • • • the marked distinction in the acts of General Assembly in dealing with trusts for religious purposes and trusts for other charitable purposes has been rigidly maintained. • • • It could hardly be the intent of the Legisla-

> ture, in the use of the words 'charitable purposes,' as set forth in section 587, to remove all restrictions upon trusts for religious purposes without specifically amending other sections of the Code dealing with the subject."

In *Triplett* v. *Trotter* (1937) 169 Va. 440, 193 S. E. 514, 516, Mr. Justice Eggleston, construing this very statute, inter alia, says that while the language is changed and broadened, "The exception of a theological seminary would indicate that the legislative intention was still directed to the location of the institution, and not to the residence of the beneficiaries in Virginia."

See, also, *Maguire* v. *Lloyd,* 193 Va. 138, 67 S.E. (2nd) 885, quoted from in our petition, which held, among other things, that charitable trusts do not include religious trusts and that there is a difference between them and the law applicable thereto so far as Virginia is concerned.

Indeed, ever since the statute was last changed there is a general recognition by the Virginia Court, as well as Virginia lawyers, that theological seminaries cannot take by bequest or devise in Virginia.

It must be apparent that under the statute theological seminaries being excepted, any devise or bequest failed as soon as the time arrived for the devise or bequest to become effective. We urge that the present statute is based on the seventh section of the 1839 act. It covered an exception as to theological seminaries, so often urged. That exception is still in the statute. It becomes operative as soon as any devise or bequest to a theological seminary is made and becomes effective. The act then operates prospectively, and the cases cited in our petition apply.

Under the statute in force when Miss Maxwell died (Code 1919, sec. 38) property could be acquired for re-

ligious purposes for (a) place of public worship; (b) cemetery; (c) residence of minister; (d) residence of bishop or other similar officer; (e) parish house; (f) sexton of church, adjacent to the church. No statute authorizes devises or bequests for theological seminaries incorporated or unincorporated. Incorporated seminaries is included in section seven and unincorporated by amendment.

If Virginia desires to change this law and apparently it does not, the General Assembly, as its Court says, should do it and not the court.

We urge again that the defendant is not properly incorporated and therefore cannot take under its charter. We urge each and every proposition formerly suggested in our petition.

AGRA B. WILLIAMS, *Petitioner,*

By AUSTIN F. CANFIELD
WILLIAM T. HANNAN
CLARENCE E. MARTIN
CLARENCE E. MARTIN, JR.
Attorneys for Petitioner

I, Clarence E. Martin, a member of the bar of the Supreme Court of the United States, certify that this petition for rehearing is presented in good faith, and, also that the additional ground, to-wit the inconsistent action of the Circuit Court of Appeals in No. 427, now pending here; the law relating to affidavits of appellee here; the additional proposition with reference to the interpretation of the statute involved; the contradiction between the law as recognized by the Supreme Court of Appeals of Virginia and the Circuit Court of Appeals of the District of Columbia.

This 7th day of November, 1952.

/s/ CLARENCE E. MARTIN